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IN THE

Supreme Court of the United States

METRO-GOLDWYN-MAYER STUDIOS INC., *et al.*,

Petitioners,

v.

GROKSTER, LTD., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, BROADCAST MUSIC, INC., ASSOCIATION OF INDEPENDENT MUSIC PUBLISHERS, CHURCH MUSIC PUBLISHERS ASSOCIATION, NASHVILLE SONGWRITERS ASSOCIATION INTERNATIONAL, AND THE SONGWRITERS GUILD OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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The American Society of Composers, Authors and Publishers, Broadcast Music, Inc., Association of Independent Music Publishers, Church Music Publishers Association, Nashville Songwriters Association International, and The Songwriters Guild of America submit this *amicus* brief in support of Petitioners.[1]

INTEREST OF *AMICI CURIAE*

Together, *amici curiae* represent a creative community of hundreds of thousands of songwriters and music publishers who create, own, promote, disseminate, and license rights in virtually all copyrighted musical works.[2] We depend on the protection of the copyright law, and especially on the doctrines of contributory infringement and vicarious liability, to enforce our rights. But we are suffering irreparable, immediate losses in mechanical, synchronization, and performance royalties from the massive and widespread

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1. Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* state that they authored this brief in whole and that no person or entity other than *amici* made a monetary contribution to its preparation or submission. All parties have consented to filing this brief, and letters reflecting their consent have been filed with the Clerk.

2. The Copyright Act separately protects musical works (which comprise music and lyrics created and owned by *amici*'s writers and publishers) and sound recordings (created and owned by recording artists and record companies). The Copyright Act does not define "musical works," but does define "sound recordings" as "works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied." 17 U.S.C. § 101.

infringements enabled by Respondents' peer-to-peer ("P2P") services, and will suffer from the long-term loss of public respect for the copyright law which follows from the legal immunity now enjoyed by Respondents, unless the Ninth Circuit's ruling is reversed.

The *American Society of Composers, Authors and Publishers* ("ASCAP") and *Broadcast Music, Inc.* ("BMI") are performing rights licensing organizations ("PROs").[3] Together, the PROs' members and affiliates comprise almost all American songwriters, composers, and music publishers; through affiliation agreements with similar foreign entities, the PROs represent in the United States virtually all of the world's writers and publishers of music. The PROs license nondramatic public performing rights in copyrighted musical works to users, including online music services, and enforce those rights against infringement.[4]

The *Association of Independent Music Publishers* is a nationwide group of approximately 400 music publishers, representing tens of thousands of musical works, whose primary focus is to educate and inform its members and others about the most current industry trends and practices, by providing a forum to discuss the issues and problems confronting the music publishing industry.

The *Church Music Publishers Association*, founded in 1926, represents forty-six member publishers, including those of almost every major church denomination, the publishing

3. PROs are sometimes termed "performing rights societies," a defined term in the Copyright Act. *Id.*

4. *See Broad. Music, Inc.* v. *Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979).

companies or affiliates of every major contemporary Christian record label, the church music divisions of several major secular publishing houses, several independent music publishers, and music publishers who are involved primarily in educational markets.

The *Nashville Songwriters Association International* ("NSAI") is a trade organization dedicated to serving songwriters of all genres of music. NSAI operates workshops in over 100 cities throughout the United States and in three other countries, to help professional and aspiring songwriters further their craft and understanding of the music business, and operates educational retreats for songwriters.

The Songwriters Guild of America ("SGA") is the nation's oldest and largest organization run exclusively by and for songwriters, with more than 5000 members nationwide. It is a voluntary association comprised of composers and the estates of deceased members. SGA provides a variety of services to its members, including contract advice, copyright renewal and termination filings, and royalty collection and auditing to ensure that they receive proper compensation for their creative efforts. SGA and its Songwriters Guild Foundation are also committed to aiding and educating beginning songwriters through scholarships, grants, and specialized programs.

Decades ago, *amici*'s songwriters and music publishers realized that secondary infringers—those who induce, contribute to, or can control infringement of musical works—are often the parties who benefit the most from, and are in the best position to end, the illegal acts. Consequently, our members brought the earliest cases that developed the doctrines of vicarious liability and contributory infringement

in copyright law. It was music publishers whose claims in *Shapiro, Bernstein & Co.* v. *H.L. Green Co.* helped establish vicarious liability for those who have "the right and ability" to supervise the infringing conduct and receive an "obvious and direct financial interest" in the infringement.[5] A few years later, a PRO, on behalf of its songwriter and music publisher members, brought *Gershwin Publishing Corp.* v. *Columbia Artists Management, Inc.*, which established contributory infringement as a basis for liability for "one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another."[6] Our members have relied on these doctrines of secondary liability to provide effective protection for their rights.[7] Courts across the country have since adopted these tests for all works protected by the Copyright Act.

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5. *Shapiro, Bernstein & Co.* v. *H.L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963).

6. *Gershwin Publ'g Corp.* v. *Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

7. *See, e.g., Casella* v. *Morris*, 820 F.2d 362, 365-66 (11th Cir. 1987) (shareholder who sold restaurant franchise rights held contributorily liable for inducing a franchisee's infringement); *Broad. Music, Inc.* v. *Blueberry Hill Family Rests., Inc.*, 89[illegible] F. Supp. 474, 480-81 (D. Nev. 1995) (owner of restaurants containing jukeboxes that played music held vicariously liable); *Broad. Music, Inc.* v. *Hartmarx Corp.*, No. 88 C 2856, 1988 WL 128691, at *3-4 (N.D. Ill. Nov. 17, 1988) (holding company held vicariously liable for infringing performances by its subsidiaries); *Barnaby Music Corp.* v. *Catoctin Broad. Corp. of N.Y.*, No. CIV-86-868E, 1988 WL 84169, at *2-3 (W.D.N.Y. Aug. 10, 1988) (owner and manager of infringing radio station held vicariously liable); *Blendingwell Music, Inc.* v. *Moor-Law, Inc.*, 612 F. Supp. 474, 481-82 (D. Del. 1985) (owner

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If the Ninth Circuit's decision is allowed to stand, the tens of millions of infringements that are now occurring every day using Respondents' software will become permanent. They will severely handicap, and may even negate, the incentives intended by the Copyright Act and the Copyright Clause—incentives which, together with our members' artistic passion, keep our members at work creating music and investing in that creation, for the benefit of the public.

SUMMARY OF ARGUMENT

Copyright owners, the courts, and the public have a stake in the continuing vitality of the secondary liability doctrines. All the reasons these doctrines are recognized in copyright law apply with full force to the infringement-encouraging activities of Respondents. First, and most fundamental, are the interests of equity and justice that make Respondents equally as, if not more culpable than, the individual direct infringers—including students and other minors—who typically use Respondents' services. Second is the need for effective protection of creators' and copyright owners' rights and judicial efficiency in the enforcement of those rights. And third is the maintenance of the public's respect for the copyright law, on which the market in copyrighted works depends. To the extent the Ninth Circuit believed its decision was dictated by its reading of this Court's decision in the *Sony* Betamax[8] case, the Court should clarify

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and manager held contributorily and vicariously liable for infringements by bar-restaurant); *Boz Scaggs Music* v. *KND Corp.*, 491 F. Supp. 908, 913-14 (D. Conn. 1980) (general manager of infringing radio station held vicariously liable).

8. *Sony Corp. of Am.* v. *Universal City Studios, Inc.*, 464 U.S. 417 (1984).

that decision: Where software is created and disseminated in such a fashion that infringing uses predominate over lawful ones, the distributor of that software is liable for the infringements it has enabled and encouraged.

ARGUMENT

I. Equity and Justice Require That Those Who Benefit Most from Infringements on P2P Networks Be Responsible for Those Infringements

As a matter of equity and justice, the doctrines of contributory infringement and vicarious liability recognize that those who derive a significant benefit from copyright infringement—here, Respondents' P2P services—should be liable, even if they do not commit the direct infringement. From our perspective, the live performance of music in bars and clubs provides an example. If performances in a club are unauthorized, the musicians in the band are directly liable for the infringement. But it makes little sense for owners of the musical works performed to sue the musicians individually. As a practical matter, musicians frequently cannot be found and rarely have the resources to pay the requisite license fees or damages. And as a matter of legal theory, although the musicians are directly liable, they are not alone expected to pay the cost of the music to be performed, as it is the club owner who ultimately benefits from those performances. The doctrines of secondary liability address this concern, by authorizing copyright owners to seek relief from those who, like the club owner, facilitate and benefit most from unauthorized uses.[9]

9. *See supra* note 7.

That analogy squarely fits the situation here. It is undisputed that Respondents' P2P services derive a direct financial benefit, from advertising revenue and otherwise, by attracting users who illegally upload and download copyrighted works.[10] Of course, Respondents would prefer to avoid any liability by having individuals who use their services shoulder *all* the risk for copyright liability—just as the club owner would prefer that only the musicians be liable for unauthorized performances occurring in his club. But it is fundamentally unjust to shift all liability to individual P2P users, when the services that encourage and facilitate the users' infringement derive significant, not to say the ultimate, benefit from the infringements.

As a matter of legal policy, Respondents' P2P services should be responsible for the illegal acts that they induce which form the core of their business.

II. Songwriters and Music Publishers Need Effective Protection for Their Works against Infringements Occurring on Respondents' P2P Services

Copyright owners must have an effective way to enforce their rights. A bare grant of rights is not sufficient. As this Court has recognized, copyrights "are not self-enforcing."[11] Unlike most other property, copyrights cannot be protected

10. *Metro-Goldwyn-Mayer Studios, Inc.* v. *Grokster Ltd.*, 380 F.3d 1154, 1164 (9th Cir. 2004).

11. *Broad. Music, Inc.* v. *Columbia Broad. Sys. Inc.*, 441 U.S. at 4.

by fences or locks, and their owners must rely solely on the protection afforded by the courts. Or, as this Court put it:

> Because a musical composition can be "consumed" by many different people at the same time and without the creator's knowledge, the "owner" has no real way to demand reimbursement for the use of his property except through the copyright laws *and* an effective way to enforce those legal rights.[12]

Thus, Congress has authorized an array of remedies for copyright infringement: injunctions, impoundment and disposition of infringing articles, monetary relief of either statutory damages or the actual damages suffered plus the infringer's profits, and an award of costs including attorney's fees.[13] Congress has also endorsed the common law secondary liability doctrines, by explicitly granting to copyright owners the exclusive right not only to "do" the acts of reproduction, distribution, adaptation, display, and performance, but also the exclusive right to "authorize" those acts.[14] This Court too has recognized that copyright holders have a

12. *Id.* at 19 n.32 (citation omitted).

13. 17 U.S.C. §§ 502-505.

14. 17 U.S.C. § 106; *see* H.R. Rep. No. 94-1476, at 61 (1976), *reprinted in* 1976 U.S.C.C.A.N 5659, 5674; *see also* H.R. Rep. No. 94-1476, at 159 *reprinted in* 1976 U.S.C.C.A.N at 5775 ("A well-established principle of copyright law is that a person who violates any of the exclusive rights of the copyright owner is an infringer, including persons who can be considered related or vicarious infringers.").

"legitimate demand for effective—not merely symbolic—protection. . . ."[15]

But we cannot effectively enforce our rights if individual P2P users are liable but the P2P services are not. The risk-to-reward ratio for individual infringing users of the P2P services is far more favorable to the infringer than it would be for the P2P services themselves if they are liable, and the cost-to-benefit ratio for copyright owners seeking to enforce their rights is skewed radically against copyright owners forced to proceed against individual P2P users. This is especially true for the individual songwriters and small independent publishers we represent.

For one, the costs of bringing and litigating lawsuits simultaneously against thousands of individuals are staggering. We must identify each infringer, gather the requisite evidence, file lawsuits in different jurisdictions, collect damages, and enforce injunctions—all requiring inordinate time, effort, and resources. Nor are these one-time expenses; we must continually locate and sue new individual infringers as they arise, or else all our prior efforts will have been futile.[16] By the same token, an individual infringer using Respondents' services faces a minuscule probability of detection and pursuit, while realistically risking only limited financial liability. A purely rational infringer would ignore

15. *Sony Corp. of Am.*, 464 U.S. at 442.

16. As *amici* well know, lawsuits against infringers should have the wider effect of educating music users as to the law's requirements and deterring others from infringing. Where there are millions of direct infringers, the educational and deterrent value of such lawsuits is limited if only a relatively minuscule number of direct infringers can be sued as a practical matter.

this risk altogether. And requiring such a multiplicity of lawsuits, rather than allowing just the one which would put an end to all the infringing acts, puts an intolerable and unnecessary burden on the courts.

Further, the very nature of online infringement makes a large number of lawsuits against individual P2P users unworkable. In a bricks-and-mortar world, it may be relatively straightforward to identify and contact an infringing bar, restaurant, radio station, distributor, or retailer. For decades, *amici* ASCAP and BMI have located such establishments that publicly perform music without authorization, educated them about the law's requirement for appropriate licenses (which most willingly take), and, as a last resort, gathered the necessary evidence, brought infringement actions, and collected judgments—all at considerable effort and expense. Online, the task is exponentially more challenging. Tracking individual P2P infringers requires technical know-how and generates largely anonymous or pseudonymous identities. Often, "John Doe" lawsuits are required to ascertain infringers' true identities, and even then, some courts refuse to let copyright owners bring one action seeking the identities of multiple "John Doe" subscribers of the same Internet service provider. Instead, plaintiffs are required to do so for each infringer separately—further increasing the burden on copyright owners and unnecessarily increasing the workload on the courts.[17]

17. *See, e.g.*, *BMG Music* v. *Does 1-203*, No. 04-650 (E.D. Pa. Mar. 5, 2004) (ordering severance of claims); *BMG Music* v. *Does 1-203*, No. Civ.A. 04-650, 2004 WL 953888 (E.D. Pa. Apr. 2, 2004) (denying request that court refrain from ordering severance until plaintiffs can ascertain defendants' identities through discovery of third-party Internet service provider); *Interscope Records* v. *Does 1-*

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Suing thousands of individuals not only swamps the courts but also ultimately yields limited success. Even the recording industry's much-publicized lawsuits against individual uploaders have reached only a tiny fraction of the tens of millions who have been induced to infringe by P2P services. The vast majority of infringers remain untouched. This challenge is compounded when the direct infringers who are sued are frequently minors and almost always without the resources to cure the overriding problem of massive online theft of copyrighted works—a problem caused by the P2P services themselves. It is the P2P services, after all, which are purveying a technology for the very purpose of infringing copyrights.

Ultimately, the substantial expense and limited success of suing individual infringers puts this option beyond reach of all but a few copyright owners. Smaller copyright owners, like *amici*'s independent music publishers or individual songwriters, may not have the resources to enforce their statutory rights if they cannot stop the infringement at the source. The practical effect is to strip them of any meaningful protection against the infringements on P2P services.

The courts devised, and Congress endorsed, the doctrine of secondary liability to address precisely this circumstance. As Judge Posner recently put it, "the impracticability or futility of a copyright owner's suing a multitude of individual infringers" justifies liability for P2P services such as

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25, No. 6:04-cv-197-Orl-22DAB (M.D. Fla. Apr. 1, 2004) (recommendation of magistrate judge to sever claims); *Interscope Records* v. *Does 1-25*, No. 6:04-cv-197-Orl-22DAB (M.D. Fla. Apr. 27, 2004) (adopting magistrate judge's report and recommendation).

Respondents', as contributors to the infringement.[18] If copyright owners are to have practical and effective protection, and if the courts are not to be deluged with litigation, Respondents must be held liable.

III. Failure to Hold Respondents Liable Undermines Respect for the Copyright Law

The Ninth Circuit's decision undermines public respect for the copyright law and the rights of copyright owners. And it is the public's voluntary respect and sympathy for the law, far more than even the power of the courts, upon which the market in copyrighted works depends.

It is undisputed that illegal uploads and downloads of copyrighted works constitute almost all of the traffic on Respondents' P2P networks.[19] But if Respondents' P2P services continue to have no risk of liability, they will thrive and grow, and new services will proliferate. As they do, direct violations of the copyright law will spread. And by relegating liability only to individual users, the Ninth Circuit has ensured that, at most, only a small fraction of infringements will ever be reached by lawsuits. Thousands of users may be sued, but tens of millions more will remain unaffected. Free from any real danger of being taken to court, P2P users will continue and increase their "sharing" of copyrighted works. The currently intolerable level of infringement will become the norm, and get worse.

18. *In re Aimster Copyright Litig.*, 334 F.3d 643, 645-46 (7th Cir. 2003), *cert. denied*, 540 U.S. 1107 (2004).

19. *See Metro-Goldwyn-Mayer Studios*, 380 F.3d at 1158; Petition for a Writ of Certiorari 1-8 (Oct. 8, 2004).

Disrespect for the law increases because copyright owners are forced to sue individual infringers rather than the P2P services which are the true source of the infringements. As we have noted, the individual infringers are frequently minors. The popular press—the public's source of most news about the legal process—plays the story not as "Creators Sue to Protect Their Property and Livelihoods," but as "12-Year Old Honor Student Sued for Listening to Music."[20] We cannot blame the press for taking the most attention-grabbing tack; the fault lies in the Ninth Circuit's misinterpretation of the law such that copyright owners must bring those individual lawsuits. The unfortunate result is that the public loses respect for the copyright law.

A recent survey confirms that Internet users' respect for the copyright law is already declining. Between 2000 and 2003—when P2P services began to explode in popularity—the share of Internet users who download music without regard to whether the music they download is copyrighted has increased nearly 10%.[21] Alarmingly, young Internet users care least about the copyright status of works available online compared to the rest of the population. Of those aged 18 to 29, 72% of downloaders, and 82% of uploaders, are indifferent about whether the music they "share" is copyrighted.[22] The Ninth Circuit's decision fosters this

20. *See, e.g.*, Soni Sangha & Phyllis Furman, *Sued for a Song*, N.Y. Daily News, Sept. 9, 2003, *available at* http://nydailynews.com/front/story/116117p-104761c.html.

21. *See* Mary Madden & Amanda Lenhart, *Pew Internet Project Data Memo*, at 1 (July 2003), *at* http://www.pewinternet.org/pdfs/PIP_Copyright_Memo.pdf.

22. *Id.* at 5-7.

growing disrespect for copyright owners' rights. It encourages current and future online users to believe that the law may be disregarded.

Immunizing Respondents' P2P services from liability sends the message that all downloading and uploading of copyrighted materials on such services is legitimate. Following the Ninth Circuit's decision, P2P services now market themselves as "legal." On its website, Grokster prominently displays a summary of the Ninth Circuit opinion,[23] which its trade organization characterizes as "a profound and major victory for the American consumer," and one which recognizes the "truth" that "decentralized peer-to-peer software programs, like Grokster and Morpheus, were built to and do comply fully with current copyright law."[24] The front page of the Kazaa website states, twice, that "Having Kazaa is 100% Legal."[25] Even without these advertisements, any user not versed in copyright law could reasonably conclude that, if having a P2P service on his or her computer is legal, then using it for its intended purpose—to download and upload copyrighted material—is also legal.[26]

23. FREE Grokster for p2p or person to person file sharing, *at* http://www.grokster.com (visited Jan. 19, 2005).

24. Grokster - Press Information, *at* http://www.grokster.com/press.html (visited Jan. 19, 2005).

25. Kazaa, *at* http://www.kazaa.com/us/index.htm (visited Jan. 19, 2005).

26. Buried in Respondents' services are statements that P2P users should not transmit copyrighted works illegally. As a matter of law, those disclaimers are no shield against liability. When club owners tried the same tack—even instructing musicians not to play

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Meanwhile, P2P services will increasingly reap rewards while making their users do the "dirty work" for them. The *Shapiro, Bernstein & Co.* court recognized this very danger when it found a defendant store owner vicariously liable:

> Were we to hold otherwise, we might foresee the prospect—not wholly unreal—of large chain and department stores establishing "dummy" concessions and shielding their own eyes from the possibility of copyright infringement, thus creating a buffer against liability while reaping the proceeds of infringement.[27]

The injustice here is manifest. If the Ninth Circuit's ruling stands, those who benefit most from and induce the infringement are free from any responsibility, while the individuals who are induced to infringe bear all of it. This unfairness only undermines the public's respect for the copyright law.

IV. The Betamax Doctrine Should Be Clarified

For several reasons, discussed in depth by Petitioners and elsewhere, the Ninth Circuit's decision is inconsistent with *Sony Corp. of America v. Universal City Studios*. For example, in *Aimster*, Judge Posner correctly applied *Sony* to rule that evidence must show that the substantial

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copyrighted music and putting up signs to that effect—the courts nevertheless held them liable as secondary infringers. *See, e.g., Chess Music, Inc.* v. *Sipe*, 442 F. Supp. 1184, 1185 (D. Minn. 1977); *Shapiro, Bernstein & Co.* v. *Veltin*, 47 F. Supp. 648, 649 (W.D. La. 1942).

27. *Shapiro, Bernstein & Co.*, 316 F.2d at 309.

noninfringing uses are probable, not merely possible.[28] Under this analysis, the Ninth Circuit's ruling must fail. Indeed, the Betamax home video recorder technology so differs from the P2P networks at issue here that *Sony* in no way requires the Ninth Circuit's result. As the Register of Copyrights aptly put it:

> if the VCR had been designed in such a way that when a consumer merely turned it on, copies of all the programs he recorded with it were immediately made available to every other VCR in the world, there is no doubt that the *Sony* decision would have gone the opposite way.[29]

Nevertheless, after twenty years and a technological revolution, a clarification of the *Sony* decision is in order. *Sony* recognized that when secondary liability for selling copying equipment is at issue, the legal status of the device depends on its uses. Because the video tape recorder was "widely used for legitimate, unobjectionable purposes" by consumers, that is, "private, noncommercial time-shifting in the home," the sale of the recorder was not an infringement.[30]

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28. *In re Aimster Copyright Litig.*, 334 F.3d at 653.

29. *Hearing on S. 2560, the Intentional Inducement of Copyright Infringements Act of 2004 before the Senate Comm. on the Judiciary*, 108th Cong. 14 (2004) (statement of the Hon. Marybeth Peters, Register of Copyrights), *available at* http://www.copyright.gov/docs/regstat072204.pdf.

30. *Sony Corp. of Am.*, 464 U.S. at 442. Indeed, the Court observed that the district court had concluded that "the average member of the public views a VTR *principally* to record a program he cannot view as it is being televised and then to watch it once at a later time." *Id.* at 421 (emphasis added).

The *Sony* Court, however, was not faced with, and did not consider, illegitimate and objectionable uses occurring on such a scale and of such a magnitude that they overwhelm any legitimate uses. In *Sony*, the most widespread use was found to be a fair use, and hence not an infringement. But here, even the Ninth Circuit seems to admit that the most widespread, ultimate use *is* an infringement.[31] The courts should therefore consider the substantiality of the infringing uses *relative to* the noninfringing uses. A more precise formulation of *Sony* is that Respondents are not liable for contributory infringement when their P2P services are capable of substantial noninfringing uses, ***unless the infringing uses predominate*** over the lawful ones. If the illegitimate distribution and operation of unlicensed P2P software overwhelm lawful file transfers, the test for contributory infringement should be met.

Undisputed record evidence demonstrates that millions of acts of infringement occur daily on Respondents' P2P services, made possible by Respondents' software. These infringements were demonstrated to account for at least 90% of their systems' total usage, and are inflicting irreparable losses to creators and copyright owners in the billions of dollars.[32] The infringing uses predominate over any noninfringing uses demonstrated by Respondents, even if those noninfringing uses are more than *de minimis*.

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31. *See Metro-Goldwyn-Mayer Studios*, 380 F.3d at 1160 (the "element of direct infringement is undisputed in this case"), 1164 (the "elements of direct infringement . . . are undisputed in this case.").

32. *See id.* at 1158; Petition for a Writ of Certiorari 1-8.

By contrast, the factual circumstances of the Betamax case were quite different. In the case of programs broadcast by free over-the-air television, copyright owners were licensing the distribution of the programs to the home, and garnering a share of the advertising revenue. Of course, distributions of copyrighted works by "file-sharing" users of P2P services are not licensed, nor are the copyright owners participating in the advertising revenue generated by these services. As to the impact on commercial markets, the private home taping in *Sony* was found not to have a substantial adverse effect on the broadcast market, while P2P services by comparison have had a demonstrably adverse effect on record sales as well as on the commercial prospects of legitimate online music services. The *Sony* Court summarized its findings about the factual record by concluding that there was:

> a significant likelihood that substantial numbers of copyright holders who license their works for broadcast on free television would not object to having their broadcasts time-shifted by private viewers. And second, respondents failed to demonstrate that time-shifting would cause any likelihood of nonminimal harm to the potential market for, or the value of, their copyrighted works. The Betamax is, therefore, capable of substantial non-infringing uses . . . ."[33]

Neither of these criteria is met here—overwhelmingly, copyright owners *do* object to P2P uses, and the harm being done is both actual and substantial.

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33. *Sony Corp. of Am.*, 464 U.S. at 456.

Given the vast differences between the distribution and operation of P2P services and the sale of home videotape machines, it is entirely consistent with *Sony* to find the Grokster, Morpheus, and StreamCast services are infringing. Respondents should be held secondarily liable for the rampant copyright infringements they make possible and from which they profit.

CONCLUSION

For the reasons set forth above, *amici* respectfully ask that the Court reverse the decision of the United States Court of Appeals for the Ninth Circuit and grant the relief requested by Petitioners.

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